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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1271

HAROLD FRANKLIN SMITH and AUBREY LEE CRUMLEY,
Petitioners,

VS.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in ..... F.2d. A copy of the official opinion of this case is appended hereto. (R 161)

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled Harold Franklin Smith and Aubrey Lee Crumley v. United States of America, No. 22157 is dated April 1, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under and by virtue of Title 18, U.S.C. 3372, within the time provided for in Rule XI and Rule 22 (2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law of gravity and importance in the administration of criminal justice which have not been but should be settled by this Court. Said Court has misconstrued and applied decisions of this Court respecting the instructions which must be given to the jury, and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTIONS PRESENTED

1.

Did the District Court err in overruling appellant's motions for judgments of acquittal?

2.

Did the District Court err in instructing the jury that one "may be considered as having aided and abetted the commission of the crime if what he did made and tended to cause its commission"?

(d)

STATEMENT OF CASE

Six defendants were charged by a seven count indictment alleging violations of the Internal Revenue Code relative to distilled spirits. Five of the defendants entered pleas of not guilty and the remaining defendant, Bohannon, pleaded guilty. On January 20, 1965, the case was tried to a jury which, by its verdict, convicted four of the five defendants on trial. It was unable to reach a verdict with respect to John Willie Brown. The other defendants were convicted.

Appellant Harold Franklin Smith was charged in all seven counts of the indictment and was convicted on all seven counts. Appellant Aubrey Lee Crumley was charged in Counts 2 through 7. The court entered a judgment of acquittal as to Crumley on Count 5 of the indictment, but the jury found him guilty on Counts 2, 3, 4, 6 and 7. The court sentenced Smith and Crumley, who are the only appellants here, each to serve two years in the custody of the Attorney General of the United States.

On March 5, 1964, agents of the Internal Revenue Service had under surveillance an unregistered distillery located in Clarke County, Georgia, on the old Hank Smith farm. When they arrived at about 9:00 o'clock P.M., they heard voices coming from the barn in which the distillery was located and heard noises which indicated that the distillery was in operation. (R 17) At about 9:30 a truck occupied by one man, later identified as McCannon (R 67) drove into the still yard. The driver and four other men unloaded sugar and fruit jars from the truck into a shed and two barns on the premises. (R 18-19)

After being unloaded, the truck left the premises (R 21) and was followed by other agents. At an opportune time, the agents stopped the truck and arrested McCannon. (R 63-67) The truck was empty, but there was a residue of bran and sugar in it. Affixed to the truck, a 1956 or 1957 GMC (R 52, 73) was a 1964 Georgia license tag, number 66 x 5. (R 67)

The officers, or some of them, surrounded the barn in which the distillery was located (R 25), and after having observed the distillery in operation through holes in the barn (R 25, 58, 74), they raided the distillery and arrested Smith and Bohannon. Smith attempted to exit through an opening in the side of the barn which was covered with tar paper, but was apprehended and forced back inside the barn. (R 59) The officers had seen both Smith and Bohannon working in the distillery prior to the actual raid. (R 27, 58, 74)

John Willie Brown was in a dwelling house located about 30 yards from the distillery. (R 30) He was arrested in the house. (R 68)

The water supply for the distillery was coming from a small stream in which a dam had been constructed, about 650 to 700 feet from the distillery. (R 75) There was a pump located about 50 feet from the stream and 75 to 80 feet from the residence of Faust. A wire for electric service to the pump ran to and was connected inside Faust's house. (R 76, 77)

While, for the sake of brevity, we have not recited the foregoing evidence at length, it is conceded for present purposes that a rather large distillery was in operation in a barn on the old Hank Smith farm. A part of the distillery and raw materials incident to its operation were located in two nearby outbuildings. The residence of John

Willie Brown was 30 yards from the distillery. He was home and knew the distillery was there. He may even have assisted in unloading raw materials at the distillery. Faust furnished electricity for the operation of the distillery, or a part of it. The officers observed Smith and Bohannon working in the distillery and observed McCannon delivering raw materials to it.

With reference to appellant Crumley, agent Scott testified that at about 2:40 A.M. o'clock on the morning of March 6, 1964, he was in the yard between the dwelling house and the distillery. He observed automobile lights traveling on the road which led off Vincent Drive toward the distillery. The vehicle approached to within 30 to 40 yards of the distillery and its headlights reflected on a government vehicle in front of the barn. The incoming vehicle was quickly shifted into reverse and backed rapidly down the road. (R 82) Scott gave chase on foot. When the vehicle, a 1957 Chevrolet, was from 75 to 80 yards from the barn, it was backed into and became stuck in a ditch. Two occupants jumped from the automobile and ran. Scott caught the driver, Crumley, and placed him under arrest. (R 83) In the trunk and on the rear floorboard of the automobile Scott observed sugar and wheat bran remnants and several Atlas labels to fruit jars. (R 84) The government vehicle was an unmarked, black Pontiac. There were several other cars in the yard at the time. (R 85)

Miss Dorothy Maynard identified herself as a deputy tax collector in charge of selling license tags in Barrow County, Georgia. (R 86) She identified a carbon copy of a tag receipt, Government Exhibit 2, issued for a ton and half 1959 GMC truck, dated January 13, 1964. (R 87, 99) She testified that there were three individuals in the courtroom who resembled persons with whom she dealt in con-

nection with the issuance of the tag. On January 12, 1964, two persons had come to her office and made an application for a license tag. The following day the application was brought back by different men. (R 91, 92) The witness saw two men in the courtroom who resembled the two men. She has seen some pictures and was able to pick them out and had seen the two men in the halls in the courthouse and was able to say "that man has a close resemblance" or "that man resembles him" without having the person pointed out to her. She saw two men in the courtroom who resembled the two men who came in on January 12, 1964. (R 93, 94) These two men were never identified by the witness.

The witness testified further, after recess for lunch, that on the first occasion two men came to her office and secured an application form. They were there about 15 minutes. When they left they took the registration form with them to get it signed. (R 96) The next day a gentleman returned with the application and identified himself as George Baker. He was in the office 15 to 20 minutes, long enough to complete the application, sign it and secure a tag. The witness believed she could identify the man who said he was George Baker and pointed out appellant Crumley as the person whom she believed to be the man. (R 97)

On cross-examination, Miss Maynard stated that she issued tag number 66 x 5 for a 1959 GMC truck. She stated that she sold 7500 license tags a year in Barrow County. In answer to the question inquiring as to whether she would swear that Crumley was the man who purchased the tag, she replied, "well, having seen him only once—he certainly resembles the man I sold the tag to. . . . I sell so many tags and see so many people I would hate to positively identify a person that I had only seen for that one

time." (R 101, 102) Answering the question, "Then you would not positively identify this defendant that you pointed out as being the same man that was in your office on January 13th," she replied, "I would rather not."

On appeal to the United States Court of Appeals for the Fifth Circuit, in a per curiam decision, the court affirmed the conviction of both defendants, holding that there was substantial evidence upon which the jury could find both appellants guilty and the respective counts upon which they were convicted beyond a reasonable doubt and the court did not err in its charge considering the charge as a whole.

REASONS FOR GRANTING THE WRIT

QUESTION ONE RESTATED

Did the Court Err in Overruling Appellants' Motions for Judgments of Acquittal?

While appellant Smith insists that he was not guilty as charged and urges that the evidence is insufficient to sustain his conviction (see his testimony at pages 116 through 129) in all candor, counsel must recognize the effect of the evidence and the controlling decisions of the appellate courts and those of the Supreme Court. We have particular reference to *United States* v. *Gainey*, ... U.S. ....., 13 L. Ed. 2d 658. Accordingly, we commit his case to the Court on the record.

The matter is different as to Crumley. If his conviction can be sustained it will find support in the record only from the following facts. In January, 1964, a man who resembled Crumley bought a license tag for a 1959 GMC truck in Barrow County. On March 5, 1964, the license tag was on a 1956 or 1957 GMC truck which delivered raw materials to an illicit distillery in Clarke County. On the

same night, at about 2:40 A.M. o'clock, Crumley drove an automobile onto the drive or road leading to the distillery—and which also led to the house which was occupied by one of the defendants. Upon seeing a strange vehicle in the yard, he attempted to back out rapidly. When his vehicle became stuck, he ran and attempted to escape. There was evidence in the form of residue, that sugar, bran and fruit jars had been in the vehicle he was driving. Based upon this evidence, he stands convicted of (1) having custody and control of the unregistered distillery (Count 2); (2) carrying on the business of a distiller without having given bond (Count 3); (3) carrying on the business of a distiller with intent to defraud the United States of taxes (Count 4); (4) possessing nontaxpaid whiskey which was located at the distillery (Count 6); and (5) possessing property intended for use in violating the Internal Revenue laws, having reference to property located at the distillery (Count 7).

First, we will address ourselves to the testimony of Miss Maynard relative to her "Identification" of Crumley. We direct the attention to the whole of her testimony as it appears at pages 86 through 102 of the record. The strongest identification she gave was to the effect that she believed she could identify Crumley as the man who purchased the tag. (R 97) From the whole of her testimony it is clear that even this must be interpreted as meaning that Crumley resembled the purchaser. As held by the Fifth Circuit Court of Appeals in *Hendrix* v. *United States*, 5 Cir., 327 F. 2d 971:

> "While questions of identity are ordinarily for the jury and testimony as to identity need not be positive and certain, *Davis* v. *United States*, 10 Cir., 78 F. 2d 501, there must be something more than the testimony of a resemblance and the fact that the person sought to

be identified was accompanying the persons who are more clearly tied in with the offense charged."

Further, with reference to her testimony, we point out that the tag issued by her was issued almost two months prior to the arrests and was issued for a 1959 GMC truck. The evidence discloses no attempt to establish whether there was a George Baker at the address given on the application or whether such person actually purchased the tag.

It is true that generally such identification evidence presents a question for determination by the jury. The uncertainty of the witness and the circumstances surrounding the identification go to the weight and credibility which will be accorded the testimony. While we contend that under the facts disclosed by the record, a finding that the evidence established that Crumley purchased the tag is not justified, and urge the court to so hold, in our further argument we will nevertheless consider this evidence as it bears upon the evidence in its entirety.

Since the decision of the Supreme Court in *United States* v. *Gainey, supra,* it can no longer be contended that the presence of an accused at the site or place where a distillery is set up and in operation does not furnish sufficient evidence to sustain a conviction. 26 U.S.C. 5601 (b). However, under the facts of this case, we do not believe the United States will seriously contend that Crumley was at the site or place of the distillery within the meaning of the statute. For the locality of the distillery with reference to the public roads, see pages 22 and 64 of the record. The distillery was not located in the open woods, as in the *Gainey* case. More than this, Crumley was never closer than from 30 to 40 yards to the distillery and was actually closer to the residence than he was to the distillery.

The presumption or inference which is justified by 26 U.S.C. 5601 (b) is a violent one. Although the Supreme Court has held the statute to be constitutional, it certainly must be construed and applied with limitations; that is, it should be strictly and not liberally construed. Its application should not be extended beyond its plain and concise language. Since Crumley was not at the site or place of the distillery, the inference authorized by the statute does not avail the government's case.

Counts 2, 6 and 7 of the indictment charge that Crumley possessed a distillery, nontaxpaid whiskey and raw materials, respectively. This court has defined possession, as is pertinent here, in *McFarland* v. *United States*, 5 Cir., 273 F. 2d 417, 419, as follows:

> "Possession of a still means that the defendant must have some dominion over the property, or some extrinsic circumstance that gives him the right to possess which includes control. It means having, holding or detention of property in one's own power or command. Ownership, whether rightful or wrongful, is not necessary to establish possession. Possession may be defined as having personal charge of, or exercising the rights of management or control over the property in question. Mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession."

While the above case was decided prior to the Gainey case, it is applicable to the present case under the facts contained in the record. The language relates to possession of a distillery, but it has equal force to the nontaxpaid spirits and the raw materials located at the site of the distillery. The evidence simply fails to show that Crumley had any dominion or control over the distillery, liquor or raw materials. Under no reasonable concept can it be said that he possessed these articles, actually or construc-

tively, or that he aided or abetted others in possessing them. There is no evidence of any act of Crumley which in any way indicates that he counseled, commanded, induced, procured or caused the possession of the articles or otherwise participated in such possession. It cannot be said that the fact that there was residue of sugar, bran and fruit jar labels in the vehicle he was driving supplies this deficit. See *Cantrell* v. *United States,* 5 Cir., 158 F. 2d 517.

Counts 3 and 4 of the indictment charge Crumley with carrying on the business of a distillery without having given bond and with intent to defraud the United States of the tax imposed on the distilled spirits. Where is there any evidence in the record that Crumley carried on the business of a distiller or aided or abetted in carrying on such business? *Vick* v. *United States,* 5 Cir., 216 F. 2d 229, is familiar to this Court. In that case the defendant was seen within 15 feet of the distillery and attempted to escape when the officers approached. The *Gainey* case now controls under such facts, if it can be said that Vick was present at the site of the distillery, but the rationale of that case is applicable here. See also *Fowler* v. *United States,* 5 Cir., 234 F. 2d 697, where the court held that the presence of the defendant in the vicinity of a gasoline operated distillery with gasoline and a piece of drainpipe, coupled with his repeated warnings to a witness to refrain from identifying him, was not sufficient to convict. In *Matthews* v. *United States,* 5 Cir., 177 F. 2d 278, the defendant Stewart was caught walking toward the distillery with a box of groceries, on a path leading to the distillery and only 30 to 40 paces from it. The court held:

> "There is no evidence whatever that Stewart ever had this distillery in his possession and custody or under his control, as charged in count 1, or that he carried

on the business of a distiller as charged in count 2. Moreover, there is no evidence that he carried on the business of a distiller with intent to defraud the United States, as charged in count 3, because under the evidence adduced *he was never shown to be present at the distillery* until arrested near the truck and taken down there by the officers." (Emphasis supplied)

The appellant in *Silva* v. *United States,* 2 Cir., 109 F. 2d 531, had frequently visited the house in which the distillery was located and had a receipt for chemicals useful in the distilling business on his person when he was arrested. *Freeman* v. *United States,* 4 Cir., 286 F. 2d 262, involved facts where the defendant, after driving around and about the distillery area, was seen walking out of the woods from the general direction of the distillery which was 15 miles from his residence. In *Cantrell* v. *United States,* 5 Cir., 158 F. 2d 517, the appellant was walking along the pathway from the road to the distillery after it had been raided. He gave the officers a fictitious name and denied having an automobile. His automobile, however, was parked in the public road near the pathway. In all of these cases the courts held the evidence to be insufficient to sustain a verdict of guilty.

In urging that the evidence as to Crumley is insufficient to support the verdict, we are well aware of the fact that this court does not function to determine the guilt or innocence of an appellant and that it will not substitute its judgment for that of the jury. *Kotteakos* v. *United States,* 328 U.S. 750; *Bales* v. *United States,* 5 Cir., 188 F. 2d 472; *Beland* v. *United States,* 5 Cir., 100 F. 2d 289. However, the judgment of conviction is reviewable by this court to determine whether the evidence is legally sufficient to sustain it. Where, as here, the judgment is based upon circumstantial evidence, the test which will be ap-

plied in making this determination is whether the jury might reasonably find that the evidence excludes every reasonable hypothesis except that of guilt. *Riggs* v. *United States,* 5 Cir., 280 F. 2d 949; *Lloyd* v. *United States,* 5 Cir., 226 F. 2d 9, 13; *Maenza* v. *United States,* 5 Cir., 242 F. 2d 308, 312. As stated in the *Riggs* case at page 955:

> "The position of the Fifth Circuit becomes even clearer when we consider that, as a practical aid to its review of the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in circumstantial evidence cases, '. . . this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt, and equally without wavering, has applied it,' *Panci* v. *United States,* 1958, 256 F. 2d 312."

Applying the foregoing principle, or any other rule of reason with a sense of justice, it can hardly be said that there is evidence sufficient to sustain the judgment against Crumley. Since the *Gainey* case is not applicable to the facts of this case then the *Bozza* case, *Bozza* v. *United States,* 330 U.S. 160, is applicable. The charges in the indictment are specific and the burden was upon the United States to show by probative evidence that Crumley had possession of the articles specified in Counts 2, 6 and 7, and that he was carrying on the business of a distiller, as charged in Counts 3 and 4. The evidence to prove these separate offenses "must point directly to conduct within the narrow margins which the statute alone defines."

Evidence creating a mere probability of guilt or giving rise to mere suspicion or conjecture of guilt is not sufficient. *Moore* v. *United States,* 4 Cir., 271 F. 2d 564, 568. One of the prime rules in the trial of a criminal case is that circumstances, when relevant and cogent, may constitute evi-

dence of guilt, but they must have legal as well as logical relevancy, and they must have probative force; that is, they must point with compelling force to the fact to be proven. *Kassin* v. *United States,* 5 Cir., 87 F. 2d 183.

There is in truth, in fact and in law no probative evidence to connect Crumley with the possession of the articles charged, including the distillery or that he carried on the business of a distiller. As stated in *Moore* v. *United States, supra,* at page 568:

> "Taken altogether, the proof in this case rises to a high level of suspicion, but evidence creating a mere probability of guilt or giving rise to a mere suspicion or conjecture of guilt is not sufficient. As held by this court in *Call* v. *United States,* 1959, 265 F. 2d 167, 173, when there is a total absence of direct proof of an essential fact, '. . . the evidentiary facts, viewed in the light most favorable to the prosecution, must fairly warrant its inference; if they do not and the inference is so tenuous as to amount to mere speculation, the verdict is conjectural and must be set aside.'"

In sum and substance, the evidence is insufficient to sustain the conviction of the charges contained in the indictment. It fails to show that Crumley either committed the offenses charged or that he aided and abetted in enterprise. The judgment should be reversed.

QUESTION TWO RESTATED

Did the Court Err in Instructing the Jury That One "May Be Considered As Having Aided and Abetted the Commission of the Crime If What He Did Made and Tended to Cause Its Commission"?

In its instructions to the jury on the issue of aiding and abetting (R 139, 141), the court rather fully and correctly instructed on the principle. However, its instruction in this regard was concluded with the following:

"It is not necessary to prove that the aider and abetter was present when the crime was committed, or actively participated in the very crime itself. He may be considered as having aided and abetted the commission of the crime if what he did made and tended to cause its commission."

Appellant excepted to the foregoing instruction as follows (R 143, 144):

"Finally we except to that portion of the charge which occurs in the latter part of the charge relating to aiding and abetting, where the court said if conduct on the part of a party—I might not have the exact language—if it is such as to promote or tended to establish the objects of the unlawful enterprise, then that party would be guilty of aiding and abetting, or that that would be aiding and abetting. We contend that particularly in this case, where the government is relying so strongly and so heavily upon the principle of aiding and abetting, that the principle of aiding and abetting should be submitted to the jury clearly and not in any way confused.

"Now the court, in connection with that charge, left it open for the jury to find that some of these defendants did tend to accomplish the objects of the criminal enterprise (124) and, therefore, because he did it, that makes him guilty of aiding and abetting. The court did elsewhere in its charge instruct the jury that one must knowingly aid and abet in order to be guilty, but here the court has really withdrawn that charge, and it was the very last thing said to the jury on the principle of aiding and abetting."

Immediately prior to the charge complained of, the court correctly charged the jury that, "the action and participation of the defendant must be such as is calculated and intended by the defendant to render some material or substantial aid or assistance to the venture." Had the court

left it there, we would have no cause to complain of the charge. However, as shown, the court in its next breath instructed the jury that one may be an aider and abetter "if what he did made and tended to cause" the commission of the crime. As stated in the exception, this left it open for the jury to find Crumley guilty of the offenses if it should find that any act of his made or tended to cause the crime, regardless of his intent or knowledge and regardless of whether such act constituted actual aiding and abetting within the meaning of 18 U.S.C. 2.

Under the facts of this case it is as plausible that Crumley went to the area for the purpose of attempting to purchase nontaxpaid whiskey as for any other purpose. The jury might have believed this. If so, under the instructions of the court, the jury would be justified in finding him guilty of some of the counts, because without customers for its product a distillery would not likely exist. The purpose of his arrival in the area could well have been to deliver the automobile to a person or persons at the distillery; to have delivered his passenger to the distillery, or to have visited the residence which was near the distillery, all without any unlawful intent. Under the instructions of the court, the jury would nevertheless have been authorized to find him guilty.

It is no answer to say that since a correct charge was given on the subject, the incorrect charge was harmless. Although the error was promptly called to the attention of the court, it was not expressly withdrawn from the jury nor the incorrect charge called to the attention of the jury. The jury should not be left to decide between conflicts in the charge. An erroneous and injurious charge is not cured by a correct statement of the law in another portion of the charge. A charge containing two distinct propositions

conflicting one with the other is calculated to leave the jury in such confused condition of mind that they cannot render an intelligent verdict.

This instruction is erroneous as an abstract principle of law, aside from the absence of a caution that any act of the defendant must be knowingly and intentionally done in furtherance of the criminal enterprise, in that it instructed the jury that appellant could be found guilty if any act of his "tended" to cause the commission of the crime. The classical definition of aiding and abetting, as found in *Nye & Nissen* v. *United States*, 336 U.S. 613, is not so loosely drawn. In fact, we have found no authority to support the theory that an act which merely "tends" to cause a crime can make the actor a criminal under the aiding and abetting statute. In *Nye & Nissen* v. *United States, supra*, the court, quoting in part from an earlier decision of another court, held:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

The case against Crumley was a close one; indeed, as we have urged, so close as to preclude submission of the same to the jury. In the absence of the tenuous identification of him as the purchaser of the truck tag—a tag which, incidentally, the record shows was apparently purchased for a truck other than the one which visited the distiller, there is little more than evidence of presence at and flight from the *vicinity* of the distillery. In such a case, where the prosecution relies wholly upon circumstantial evidence girded by the principle of aiding and abetting, it is important that the court exercise extreme care in charging the jury on the principle of aiding and abetting. We

think that the harmful and prejudicial effect of the loosely stated, inapt and erroneous charge is demonstrated by the verdict of the jury finding Crumley guilty on all of the counts submitted to it.

Under the peculiar circumstances of this case, it cannot be said that the instructions were not harmful. The judgment should be reversed.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

.....

JOHN N. CRUDUP

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ROBERT B. THOMPSON

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing petition of Harold Franklin Smith and Aubrey Lee Crumley were this date deposited in the United States Post Office, Gainesville, Georgia, with air mail postage prepaid, addressed as follows: Solicitor General, Department of Justice, Washington 25, D.C.; Rufus D. McLean, Esq., Special Attorney, Department of Justice, Washington 25, D.C.; and E. Coleman Madsden, Esq., United States Attorney, Miami, Florida.

This ____ day of April, 1966.

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JOHN N. CRUDUP

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ROBERT B. THOMPSON